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Cover Page Footnote

J.D. Candidate, 1996, Fordham University, B.A., 1992, Brandeis University. The author thanks Professor Michael Madison, Professor Robert Zinman, and Dennis S. Klein, representing the RTC in Diamond, sine qua non. The author also thanks Journal editors Benjamin Waltuch, Justin Green, Christine Fernandez and Caroline Berry for their comments and suggestions.

DIAMOND¹ IS THE RTC'S BEST FRIEND: FEDERAL PREEMPTION AND THE BALANCE OF THE TERM OF RENT REGULATED LEASES IN *RESOLUTION TRUST CORPORATION v. DIAMOND*

I. Introduction

Sam and Patricia Smith are very lucky people. For over forty years, they have lived in a seven room apartment on the upper-east side of New York: the most expensive part of the city. While many of their neighbors pay several thousand dollars of rent per month, the Smiths pay only two hundred dollars per month. Their apartment is regulated by the New York City rent regulations.

Through a default of the landlord under its mortgage, title to this apartment passed to Alpha Savings and Loan Association which was insured by the Federal Deposit Insurance Corporation ("FDIC"). Unfortunately, the building with the Smiths' apartment was not the only near worthless asset Alpha Savings and Loan owned. Alpha Savings and Loan soon failed, and the Resolution Trust Corporation ("RTC") became its receiver. The RTC's first action was to disaffirm the Smiths' lease through its disaffirmance powers set forth in 12 U.S.C. § 1821(e)(1).

The conflict between the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)² and the New York City rent regulations contained in this hypothetical situation, is the subject of this Note.³ In *Resolution Trust Corporation v. Diamond*, the RTC sought to disaffirm leases regulated by the New York City rent regulations.⁴

1. Resolution Trust Corporation [hereinafter "RTC"] v. Diamond, 18 F.3d 111 (2d Cir. 1994) [hereinafter *Diamond I*], *vacated, remanded sub nom.*, Solomon v. Resolution Trust Corp., 115 S. Ct. 43 (1994), and *vacated, remanded sub nom.*, Pattullo v. Resolution Trust Corp., 115 S. Ct. 44 (1994), and *on recons., reinstated, in part, modified, remanded*, RTC v. Diamond, 45 F.3d 665 (2d Cir. 1995) [hereinafter *Diamond II*], *cert. denied*, Solomon v. RTC, 115 S. Ct. 2609 (1995), and *cert. denied*, Pattullo v. RTC, 115 S. Ct. 2609 (1995).

2. Pub. L. No. 101-73, 103 Stat. 183.

3. New York, N.Y., RENT CONTROL, CITY RENT AND REHABILITATION LAW § 26-401 - § 26-415 (1992) [hereinafter, RENT CONTROL CODE]; New York, N.Y., RENT STABILIZATION, RENT STABILIZATION LAW OF 1969, § 26-501 - § 26-520 (1992) [hereinafter, RENT STABILIZATION CODE].

4. *Diamond*, 18 F.3d at 115.

Congress passed FIRREA in response to the 1980s debacle in the savings and loan industry.⁵ Through this statute, the Federal Government spent over a hundred of billion dollars to insure the continuity and safety of the nation's banking industry.⁶ FIRREA made vast changes to a host of banking regulations and created the RTC.⁷ The RTC's function is to manage and resolve cases where a conservator or receiver has been appointed to an institution insured by the Federal Savings & Loan Insurance Corporation, as well as to manage and liquidate the Federal Asset Disposition Association.⁸

New York City passed the New York City Rent and Rehabilitation Law ("rent control")⁹ and the Rent Stabilization Law of 1969 ("rent stabilization")¹⁰ in response to a housing crisis.¹¹ Together, these provisions (collectively, the "rent regulations") provide an extensive framework, whereby the rents for affected apartments are fixed by law.¹² The explicit goal of the rent regulations is to increase the availability of affordable housing.¹³

In 1991, the rent regulations and FIRREA clashed in *RTC v. Diamond*.¹⁴ The RTC had become receiver of a failed savings and loan, Nassau Federal Savings and Loan.¹⁵ In 1990, the RTC, as receiver, repudiated nine rent regulated apartment leases,¹⁶ pursuant to 12 U.S.C. § 1821(e), which gives receivers the right to repudiate burdensome contracts and leases.¹⁷ The RTC initiated suit in federal district court against the tenants to compel them to vacate

5. H.R. REP. NO. 54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 98 - 99.

6. *See infra* note 56 and the accompanying text.

7. *See infra* notes 58 and 59 and the accompanying text.

8. 12 U.S.C. § 1421(b)(3)(A), (B); 12 U.S.C. § 1421(f). *See infra* note 60 and the accompanying text.

9. *See supra* note 3.

10. *See supra* note 3.

11. RENT CONTROL CODE § 26-401; RENT STABILIZATION CODE § 26-501.

12. *See infra* part II.A.

13. *See supra* note 11. *See also infra* notes 29 - 31 and 34 and the accompanying text.

14. 801 F. Supp. 1152, 1154 (S.D.N.Y. 1992), *reversed by Diamond I*, 18 F.3d 111 (2d Cir. 1994), *vacated, remanded sub nom.*, Solomon v. Resolution Trust Corp., 115 S. Ct. 43 (1994), *vacated, remanded sub nom.*, Pattullo v. Resolution Trust Corp., 115 S. Ct. 44 (1994), *and on recons., reinstated, in part, modified, remanded, Diamond II*, 45 F.3d 665 (2d Cir. 1995), *cert. denied*, Solomon v. RTC, 115 S. Ct. 2609 (1995), and *cert. denied*, Pattullo v. RTC, 115 S. Ct. 2609 (1995).

15. *Diamond I*, 18 F.3d at 115.

16. *Id.*

17. *Id.* *See also* H.R. REP. NO. 54(I), 101st Cong., 1st Sess., at 331 (1989), *reprinted in*, 1989 U.S.C.C.A.N. 86, 127; *infra* note 63 and the accompanying text.

the premises.¹⁸ The district court granted summary judgment for the tenants, holding that the rent regulations created "statutory tenancies."¹⁹ Those tenancies, according to the district court, are creatures of statute, not common law leases originating from an agreement of two or more parties.²⁰ Therefore, the district court held that the tenancies were beyond the scope of the RTC's disaffirmance powers, which allow them to repudiate only "contracts and leases."²¹

In March 1994, the Second Circuit reversed, holding that the repudiation powers granted to the RTC by FIRREA preempted the New York City rent regulations.²² The court, however, gave the lessees the option to remain in their apartments for the balance of the term of their leases, as is required by 12 U.S.C. § 1821(e)(5)(A).²³ The court further held that the term of a rent controlled lease is two years.²⁴ In October 1994, the Supreme Court vacated and remanded the case²⁵ because of the Court's decision in *O'Melveny & Myers v. Federal Deposit Insurance Company*, which had been issued three months after the Second Circuit's decision.²⁶ In February 1995, the Second Circuit reinstated its earlier decision, holding that *O'Melveny* did not affect its reasoning.²⁷

Part II of this Note provides an overview of the New York City rent regulations and FIRREA and discusses their relevance to the *Diamond* decisions. Part III of this Note describes the reasons the RTC should be allowed to repudiate the tenancies, based on express and conflict preemption analyses. Part IV addresses the

18. The RTC also named, as defendants, the Attorney General of New York and the Commissioner of the Division of Housing and Community Renewal. *Diamond*, 801 F. Supp. at 1154.

19. *Id.* at 1159, 1164.

20. *Id.* at 1159.

21. The repudiation powers are derived from 12 U.S.C. § 1821(e)(1) (Supp. 1993). For a more thorough analysis of this opinion, see *infra* Part II.C.

22. *Diamond I*, 18 F.3d 111.

23. *Diamond I*, 18 F.3d at 124.

24. *Id.*

25. *Solomon v. Resolution Trust Corp.*, 115 S. Ct. 43 (1994); *Pattullo v. Resolution Trust Corp.*, 115 S. Ct. 44 (1994).

26. 114 S. Ct. 2048 (1994). *O'Melveny* held that state law governed the issue of whether the knowledge of corporate officers acting against the corporation's interest will be imputed to the FDIC when it sues as receiver of the corporation. Thus, *Diamond I* was vacated and remanded to allow the Second Circuit to consider the case in light of *O'Melveny*. For a more in depth analysis, see *infra* Part II.D.

27. *Diamond II*, 45 F.3d 665 (2d. Cir 1995). For a more thorough analysis of this opinion, see *infra* part II.E.

length of the balance of the term of a rent regulated lease. Part V concludes that the rent regulated leases may be repudiated by the RTC, that the balance of the term of a *rent stabilized* lease is the remaining time in the renewal period, and that more statutory guidance is needed to resolve what is the balance of the term of a *rent controlled* lease.

II. Background

A. Nature of Rent Regulations in New York City²⁸

After World War II, a housing crisis existed in New York City.²⁹ The New York State legislature passed the Local Emergency Housing Rent Control Act in 1962 to alleviate the shortage of affordable, well-maintained housing.³⁰ New York City responded quickly by enacting rent control.³¹ Rent control applies to "any building or structure . . . occupied . . . by one or more individuals . . . which is not owned by the city and which was rented prior to May [1, 1950],"³² and completed before February, 1947.³³

28. See generally Martin A. Shlufman, *Rent Control and Rent Stabilization in New York State*, 396 PLI/REAL 169 (1993); Symposium, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 727 (1988); UPDATE - THE NEW RENT STABILIZATION CODE (Committee on Landlord and Tenant of the Real Property Law Section and the Committee on Continuing Legal Education of the New York State Bar Association).

29. See RENT CONTROL CODE § 26-401, which states, in its relevant part, The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the city, which emergency was created by war, the effects of war and the aftermath . . . that there continues to be an acute shortage of dwellings . . . that preventive action through enactment of local legislation by the council continues to be imperative

30. N.Y. UNCONSOL. LAW § 8602-03 (McKinney 1987). The Local Emergency Housing Rent Control Act granted New York City, along with other cities in the state, the right to enact local rent control laws, administer such laws, and issue regulations pursuant to such laws. This law was actually a successor to the Emergency Housing Rent Control Law passed in 1946. See generally *Festa v. Leshen*, 537 N.Y.S.2d 147 (N.Y. App. Div. 1989).

31. RENT CONTROL CODE.

32. RENT CONTROL CODE § 26-403e.1.

33. RENT CONTROL CODE § 26-403e.2. (which actually reads, "[t]he term 'housing accommodation' shall not include: . . . (h) . . . housing accommodations which were completed on or after February First, nineteen hundred forty-seven."). Several exceptions are enumerated, however. *Id.* at § 26-403e.2. They include, among others, charitable or educational institutions, *Id.* at § 26-403e.2.(b); some hotels, *Id.* at § 26-403e.2.(c); motor courts, *Id.* at § 26-403e.2.(d); housing accommodations owned and operated by the United States, New York State, or the New York Housing Authority, *Id.* at § 26-403e.2.(f); and, "nonhousekeeping furnished housing accommodations located within a single dwelling unit . . . but only if: (1) no more than two tenants . . . (2) the remaining portion of such unit is occupied by the landlord . . ." *Id.* at § 26-403e.2.

In 1969, the New York City Council, noting that "a serious emergency continues to exist" in the city, added the rent stabilization code to the existing rent regulations.³⁴ Rent stabilization applies to all units completed after February 1, 1947, containing six or more units, which are not owned as cooperatives or condominiums,³⁵ and are not located in a building for which a certificate of occupancy was obtained after March 10, 1969.³⁶ Taken together, the rent regulations are an attempt by the City of New York to insure the availability of affordable housing by fixing the rents of many apartments within the city limits.³⁷

Rent control determines an apartment's rent by fixing it at approximately the rate charged in 1962.³⁸ Since 1974, landlords can adjust the maximum rent biennially.³⁹ Even if rent control allows a landlord to adjust the maximum rent, the landlord cannot increase the rent more than 7.5% in any one year,⁴⁰ and all decisions to raise rents must be made after a public hearing.⁴¹ In addition, the

34. RENT STABILIZATION CODE.

35. *Id.* at § 26-504a.

36. *Id.* at § 26-504a.(1)(d). Notable exemptions from rent stabilization include housing subject to any state rent regulation, units that become vacant after June 30, 1971, and units not occupied as primary residence as determined by a court of competent jurisdiction. *Id.* at § 26-504a.(1).

37. The *Diamond* case also concerns the Martin Act, New York's blue sky law, which implements certain provisions of the rent regulations. N.Y. GEN. BUS. LAW. § 352-eeee2(c). The law creates regulations dealing with the conversion of apartment buildings to cooperative corporations ("Co-ops") and condominium apartments. While it is true that the Martin Act applies to the apartments in the *Diamond* case, and the rent regulations apply to those apartments through that process, the details of the Martin Act are beyond the scope this note. As the Second Circuit, in *Diamond I* ruled, "The Martin Act . . . alters our analysis not at all . . . '[N]o private action has been expressly authorized' in the Martin Act . . . The Martin Act thus does no more than require that certain statements be included in the offering documents." *Diamond I*, 18 F.3d at 121 (quoting *CPC Int'l Inc. v. McKesson Corp.*, 514 N.E.2d 116, 118 (N.Y. 1987)).

38. Rent control determined the rent by first establishing a formula to determine the maximum gross building rental for each building. The maximum gross building rental was computed by combining, "real estate taxes, water rates and sewer charges and an operation and maintenance expense allowance, a vacancy allowance not in excess of two [percent], and a collection loss allowance, and an eight and one-half [percent] return on capital value." RENT CONTROL CODE § 26-405(3). It then allocates a percentage of this total to each housing accommodation within the building to set the initial maximum chargeable rent for each apartment, as of April 30, 1962. *Id.* at § 26-405(1). Consideration was to be given to the size and location of the housing accommodations. *Id.* at 26-405(3).

39. *Id.* at § 26-405(4). There were, however, a set of increases built into the code that went into effect prior to 1972. *Id.* at § 26-405(2).

40. *Id.* at § 26-405(5).

41. *Id.* at § 26-405(9)(a).

broad discretionary power granted to the city rent agency by the rent regulations may have a further impact on the ability of landlords to raise rents.⁴² Thus, under rent control, if the tenant does not vacate the apartment and continues to pay rent, it is extremely difficult for the landlord to raise the rent.

One of the major differences between rent control and rent stabilization is the length of the term of the lease. Rent control provides for a somewhat fixed rent, extending the term for as long as the tenant continues to pay rent.⁴³ Instead of extending the term of the lease indefinitely, rent stabilization provides for an automatic renewal of the lease term.⁴⁴ The tenant and the landlord sign a new, written lease after each term of one or two years.⁴⁵

The rent fixed by the rent stabilization code is somewhat closer to market rent than rent control.⁴⁶ The rents may be increased for a specific list of reasons,⁴⁷ including when there is a vacancy in the housing accommodation,⁴⁸ and, when landlords complete a building-wide major capital improvement.⁴⁹ In addition, once every two years,⁵⁰ the landlord may obtain a rent increase if hardship is shown.⁵¹

42. The rent control code does provide some guidance. *See generally id.* at § 26-405(9)(g)(1). For example, it states that adjustments shall be made where, "rental income from a property yields a net annual return of less than [6%] of the valuation of the property." *Id.* at § 26-405(9)(g)(1)(a).

43. *Id.* at § 26-408a.

44. RENT STABILIZATION CODE § 26-511c(4).

45. *Id.*

46. First, the initial legal regulated rent of a housing accommodation was the rent reserved in the last effective lease or other rental agreement. *Id.* at § 26-512(b)(3). *But see id.* at § 26-512(b)(1), (2); *id.* at § 26-512(e). Next, the tenant or the owner may apply for an adjustment of this initial rent. *See generally id.* at § 26-513(a); *id.* at § 26-513(b)(1), (2). This is distinct from rent control, where the initial legal rent is based on the original lease.

47. *Id.* at § 26-511(c).

48. *See generally* UPDATE - THE NEW RENT STABILIZATION CODE, *supra* note 28. The rules are fairly specific as to when the rent may be increased, without a vacancy of the tenant. *See generally* RENT STABILIZATION CODE § 26-511.

49. RENT STABILIZATION CODE § 26-511(c)(6)(b). The rent may only be increased, however, at a maximum rate of six percent per year. *Id.* at § 26-511(c)(6)(b).

50. *Id.* at § 26-530(b).

51. *Id.* at § 26-511c(6)(a). Because the Conciliation and Appeals Board reviews hardship applications, there is very little case law concerning what constitutes a hardship. For more information, *see generally* Matter of Windsor Park Tenants' Assoc. v. N.Y.C. Conciliation and Appeals Bd., 59 A.D.2d 121 (1977) (holding that the appellee must conduct a meaningful review of any application for hardship by a landlord).

The common goal of both rent control and rent stabilization is to prevent an acute shortage of affordable dwellings.⁵² Most economists, however, have argued that rent regulations of this kind exacerbate the very problem that they were intended to solve.⁵³ Nevertheless, most mainstream politicians support the continuation of rent control and rent stabilization in New York City.⁵⁴ This is, perhaps, a testament to the political power wielded by the rent regulated tenants in New York.⁵⁵

B. FIRREA

In the 1980s, a crisis struck the savings and loan industry. Reuters estimates that from the mid 1980s through the beginning of 1993, the size of the bailout had already reached \$145 billion, with an additional \$45 billion requested by President Clinton.⁵⁶

52. *Id.* at § 26-401(a); *Id.* at § 26-501. See *supra* note 11 and the accompanying text.

53. The economists theorize that artificial price ceilings will reduce supply by reducing profitability for owners of buildings. In situations of marginal profitability, there is little, if any, incentive to keep the rent regulated apartments well maintained. See, e.g., Carol Rapaport, *Rent Regulation and Housing-Market Dynamics*, 82 AMERICAN ECONOMIC REVIEW 446 (1992); John C. Moorhouse, *Long-Term Rent Control and Tenant Subsidies*, 27 QUARTERLY REVIEW OF ECONOMICS & BUSINESS 6 (1987). For excellent international perspectives on the issue, see also Stephen Malpezzi, *Can New York and Los Angeles learn from Kumasi and Bangalore? Costs and benefits of rent controls in developing countries*, 4 HOUSING POLICY DEBATE 589 (1993); THE COUNCIL FOR INTERNATIONAL URBAN LIAISON, *RENT CONTROL IN NORTH AMERICA AND FOUR EUROPEAN COUNTRIES* (1977); INSTITUTE OF ECONOMIC AFFAIRS, *VERDICT ON RENT CONTROL* (1972).

54. Most New York politicians have come out in favor of rent regulations. In the 1992 New York City mayoral campaign, both the Republican candidate, Rudolph Giuliani, and the Democratic incumbent, David Dinkins, were in favor of continuing the rent regulations. Ronald Brownstein, *Whites Screaming At Blacks. Chasids Suing the Mayor. Latinos Grumbling They've Been Ignored. And Two Flawed Candidates Navigating the Edges of the Maelstrom. It's a Helluva Mayor's Race*, LOS ANGELES TIMES, Oct. 17, 1993 (Magazine) at 12. Newsday reported that Senator Al D'Amato has reversed his views. His opinion appears to have changed from being against rent control, to being in favor of it. *Campaign '92 D'Amato's Record Sen. Pothole: The Record*, NEWSDAY, Oct. 4, 1992 (Nassau and Suffolk ed.) at 4. One of the few politicians that came out against rent regulations in New York was Vice President Dan Quayle, who called it, "that enduring monument to economic illiteracy. . ." *The Enduring Cost of Rent Control*, N.Y. TIMES, June 27, 1992, § 1 (Editorial Desk), at 22.

55. See John Riley, *Reluctant Warriors; Rent battle tests wimp factor in city's 6 Republican senators*, NEWSDAY, June 27, 1993 (News) at 18; *Rent Control Forever*, N.Y. TIMES, May 27, 1985 (Editorial Desk) at 18. Interestingly, Massachusetts has begun to phase out rent control. See Michael Kenney, *The big winner; On the rent control issue is Gov. Weld*, BOSTON GLOBE, Jan. 8, 1995 (City Weekly) at 1; *Rent Control phase-out*, PROVIDENCE JOURNAL-BULLETIN, Jan. 8, 1995 (Editorial) at 8D.

56. Reuters, *\$45 Billion More Sought to Bail out Failed S & L's*, DETROIT FREE PRESS, March 17, 1993, at 2E. It is evident, however, that the numbers of failures

Congress passed FIRREA in an effort to handle the current crisis and to prevent another.⁵⁷ FIRREA amended many provisions of the banking laws, vastly increased the powers of the Federal Deposit Insurance Corporation, created the RTC and its oversight board,⁵⁸ and abolished the Federal Home Loan Bank Board and the FSLIC.⁵⁹

The RTC's function is to manage all failed banks and their assets, insured by the FSLIC between January 1, 1989 and August 9, 1992.⁶⁰ The stated goals of the RTC are:

- (i) to maximize the net present value return from the sale or other disposition of institutions,
- (ii) to minimize the impact of transactions on local real estate and financial markets,
- (iii) to make efficient use of funding,
- (iv) to minimize losses, and,
- (v) to maximize the availability and affordability of residential real property for low and moderate-income individuals.⁶¹

have, of late, reduced significantly. See Reuters, *A Failure-Free 1st Quarter Reported for U.S. Banks*, CHICAGO TRIBUNE, May 29, 1994, at Business, 9.

57. H.R. REP. NO. 54(I), 101st Cong., 1st Sess. (1989), reprinted in 1989 U.S.C.C.A.N. 86, 98.

58. The Oversight Board's function is to oversee and be accountable for the RTC. 12 U.S.C. § 1441a(a). The Oversight Board consists of five members; the Secretary of the Treasury; the Chairman of the Federal Reserve; the Secretary of Housing and Urban Development; and two other members, appointed by the President, with the advice and consent of the Senate. 12 U.S.C. § 1441a(3)(A).

59. For an overview of FIRREA, see, e.g., Annual Survey Issue, *Financial Institutions and Regulations, The S&L Crisis: Death and Transfiguration*, 59 FORDHAM L. REV. S1 (1991); Michael P. Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping The Enforcement Process of Federal Bank Regulation*, 50 OHIO ST. L.J. 1117 (1989); Paul W. Grace, *An Overview of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, C456 ALI-ABA 235 (1989).

60. 12 U.S.C. § 1441a(b)(3)(A). In addition, the RTC's duties include management of the Federal Asset Disposition Association. 12 U.S.C. § 1421(b)(3)(B). FIRREA also states that within 180 days of FIRREA's enactment, the RTC must liquidate the Federal Asset Disposition Association. 12 U.S.C. § 1441a(f). The RTC has many additional powers, including: the power to adopt, alter, and use a corporate seal, enter into contracts, to make payments, "to acquire, hold, lease, mortgage, maintain, or dispose of . . . real and personal property . . . and . . . exercise all the usual incidents of ownership," to sue and to be sued, to deposit any securities or funds, "to take warrants, voting and nonvoting equity, or other participation interests in institutions or assets," to prescribe bylaws, to make loans, to issue capital certificates, and to prepare and provide such reports as required by FIRREA. 12 U.S.C. § 1441a(b)(10). In order to carry out its functions, the RTC may also create new depository institutions, or merge or consolidate two or more existing depository institutions. 12 U.S.C. § 1441a(b)(11)(A)(iv).

61. 12 U.S.C. § 1441a(b)(3)(C)(i) - (v).

In an important grant of power, FIRREA states that no court may restrain or affect the exercise of powers or functions of the RTC as a conservator or a receiver.⁶²

At issue in the *Diamond* case is 12 U.S.C. § 1821(e)(1). This provision grants the RTC the power, as conservator or receiver, to:

disaffirm or repudiate any contract or lease (A) to which such institution is a party; (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and (C) the disaffirmance or repudiation of which the conservator or receiver determines . . . will promote the orderly administration of the institution's affairs.⁶³

C. *RTC v. Diamond*⁶⁴

In the summer of 1987, the title to nine apartments at 444 East 57th Street passed to Nassau Federal Savings & Loan, as collateral on a defaulted loan.⁶⁵ The RTC was appointed as conservator of this savings and loan ("S & L"). Unfortunately, this S & L failed.⁶⁶ On becoming receiver, the RTC proceeded to reorganize the NFSL as a new institution called Nassau Savings and Loan Association, F.A. ("Nassau S & L").⁶⁷ On November 16, 1990, the RTC closed Nassau S & L, became receiver of Nassau S & L, and began to liquidate its assets pursuant to FIRREA.⁶⁸

Shortly after the RTC had become conservator of NFSL, the RTC sent a letter to the tenants of the nine apartments, repudiat-

62. 12 U.S.C. § 1821(j)(Supp. 1993). This broad grant of power will have great significance on the issue of courts' deference to the RTC. See *supra* part III.A(ii). Another grant of power allows the RTC to sue directors or officers of an insured depository institution and hold them personally liable for monetary damages. 12 U.S.C. § 1821(k). See also Douglas V. Austin and Sidney M. Weinstein, *Bank Officer and Director Liability Under FIRREA: The Need for a National Standard of Gross Negligence*, 111 BANKING L.J. 67 (1994).

63. See generally Gregory J. Pulles, *Defining the Boundaries of the FDIC's Repudiation Authority Under FIRREA*, 16 HAMLINE L. REV. 17 (1992); Eric William Hess, Note, *Federal Preemption of Rent Regulation Under FIRREA*, 20 FORDHAM URB. L.J. 939 (1993).

64. 801 F. Supp. 1152 (S.D.N.Y. 1992), *rev'd*, *Diamond I*, 18 F.3d 111 (2d Cir. 1994), *vacated, remanded sub nom.*, *Solomon v. Resolution Trust Corp.*, 115 S. Ct. 43 (1994), *vacated, remanded sub nom.*, *Pattullo v. Resolution Trust Corp.*, 115 S. Ct. 44 (1994), *and on recons., reinstated, in part, modified, remanded, Diamond II*, 45 F.3d 665 (2d Cir. 1995), *cert. denied*, *Solomon v. RTC*, 115 S. Ct. 2609 (1995), and *cert. denied*, *Pattullo v. RTC*, 115 S. Ct. 2609 (1995).

65. *Diamond I*, 18 F.3d at 115.

66. *Id.*

67. *Id.*

68. *Id.*

ing their leases.⁶⁹ The RTC sent a second repudiation letter after becoming receiver for Nassau S & L.⁷⁰ In each letter, the RTC notified the tenants that they could either, "(a) treat[] the tenancy as terminated, (b) remain[] in possession for the balance of the lease-term, or (c) purchase[] the unit on stated terms."⁷¹ Instead, the tenants chose to file a complaint with the New York Division of Housing and Community Renewal (DHCR).⁷² The Attorney General of New York, on behalf of the tenants and the State of New York, protested that the RTC had exceeded its authority.⁷³ In response to that protest and to alleviate other concerns,⁷⁴ the RTC issued a policy statement that indicated that it would not repudiate rent regulated leases of low and moderate-income tenants.⁷⁵

On February 25, 1991, the RTC filed a complaint in district court, seeking to evict the tenants, none of whom were of low or moderate-income.⁷⁶ The defendants argued that, under state law, the tenancies were not leases, but were "statutory tenancies." Thus, 12 U.S.C. § 1821(e)(1), which allows the RTC to disaffirm "any contract or lease," did not encompass the tenancies.⁷⁷ In its cross motion, the RTC argued that FIRREA preempted the state rent regulations, granting the RTC the power to repudiate the leases.⁷⁸

On August 21, 1992, the court granted summary judgment for the tenants.⁷⁹ District Court Judge Carter divided the federal preemption issue into two questions,

- 1) whether the tenants in this case have occupancy rights by virtue of leases or instead pursuant to statutory tenancies independent of any leases; and

69. *Id.*

70. *Diamond I*, 18 F.3d at 115.

71. *Id.* at 116.

72. *Id.*

73. *Id.*

74. This includes its goal to maximize the availability and affordability of resident real property for low and moderate-income individuals. 12 U.S.C. § 1441a(b)(3)(C)(v).

75. *Diamond I*, 18 F.3d at 116 (quoting RTC Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulations (February 22, 1991)).

76. The complaint named the nine tenants, the commissioner of the DHCR, and the Attorney General of the State of New York as defendants. *Diamond I*, 18 F.3d at 116.

77. *Id.* at 116 - 117.

78. *Id.* at 117.

79. *Diamond*, 801 F. Supp. at 1164.

2) if these rights derive from statutory tenancies, whether the "any contract or lease" language of section 1821(e)(1) empowers the RTC to repudiate statutory tenancies as well as the more traditional landlord-tenant relationship embodied in a lease.⁸⁰

The district court held that New York law, "makes clear that the tenants it covers enjoy a protection from eviction that is independent of any lease that may exist between landlord and tenant."⁸¹ The district court concluded that the rent regulations create statutory tenancies, which are separate and distinct from common law leases.⁸²

The court then considered whether § 1821(e)(1) gives the RTC the power to disaffirm 'statutory tenancies'. First, the court dismissed the argument that, under the broad grant of interpretive powers of § 1821(j),⁸³ the RTC deserved considerable deference for its interpretation of FIRREA.⁸⁴ Next, the court analyzed the five goals of the RTC enumerated in § 1441(b)(3)(C) and held that interpreting § 1821(e)(1) as not including the 'statutory tenancies' would be consistent with those goals.⁸⁵ Finally, the court held that

80. *Id.* at 1157.

81. *Id.* at 1157. The district court cited only two cases to support this interpretation of New York Law. See *Friarton Estates Corp. v. City of New York (In re Friarton Estates Corp.)*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986) (holding that application of rent control to debtor was not an unconstitutional taking and that the Bankruptcy Code did not entitle debtor to reject leases); *W.T. Assocs. v. Huston*, 472 N.Y.S.2d 562 (Sup. Ct. 1984) (granted, in a fact intensive decision, a preliminary injunction to the defendants, where plaintiffs, landlords of an apartment building undergoing cooperative conversion, sought to enter to improve apartments). It did not attempt to explain how a lease "may exist" between the landlord and the tenant and yet not be "any lease or contract" as used by § 1821(e)(1).

82. *Diamond*, 801 F. Supp. at 1159.

83. The district court cited *Rosa v. RTC*, 938 F.2d 383 (3d Cir. 1991) (holding that courts, when applying § 1821(j), should consider whether the RTC's "powers or functions" under FIRREA would be restrained or affected by a district court decision). For a more detailed discussion, see *supra* part III.A.(ii).

84. Agencies are typically granted deference, especially when interpreting their own governing statute. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (upholding the Environmental Protection Agency's regulation interpreting the term "stationary source" in the Clean Air Act Amendments). For a more detailed discussion, see *supra* part III.A.(ii).

85. The goals are discussed *supra*, at note 61, and the accompanying text. The court's holding in this section relies on subdivisions (ii) and (v), which state that the RTC should, "(ii) minimize[] the impact of such transactions on local real estate and financial markets . . . (v) maximize[] the preservation of the availability and affordability of residential real property for low and moderate-income individuals." *Diamond*, 801 F. Supp. at 1161. The court seemed to ignore that elimination of rent control would restore the real estate and financial markets to their unaffected state. In addition, the court dismissed the impact of the RTC's policy statement where the

FIRREA did not preempt the city rent regulations⁸⁶ and that the rent regulations did not conflict with the ability of the RTC to carry out the goals and provisions of FIRREA.⁸⁷ The court stated that,

[w]hile the RTC's inability to evict rent-regulated tenants may indeed hinder its resolution efforts, such hindrance derives not from restrictions state laws place on the powers of the RTC, but rather from the fact that Congress did not give the RTC the power to repudiate statutory tenancies in the first place.⁸⁸

The district court reasoned that since the rent regulations created statutory tenancies and that such tenancies are outside the powers of the RTC, FIRREA does not preempt the rent regulations.⁸⁹

In March 1994, the U.S. Court of Appeals for the Second Circuit reversed the district court decision, holding that the RTC does have the power to disaffirm the rent regulated leases ("*Diamond I*").⁹⁰ After analyzing the rent regulations, the court held that each rent regulated lease is defined and governed by contract.⁹¹ The court, at some length, showed how the provisions of the original leases carried over into the renewal periods, with the exception of rent and duration.⁹² The Second Circuit, therefore, held that the rent regulations did not create "statutory tenancies" independent of leases; rather, rent regulations merely affected existing leases.⁹³ Thus, under FIRREA, the RTC has the power to repudiate the leases.⁹⁴

To ascertain Congress's intent, the court compared FIRREA to the Bankruptcy Code from which § 1821(e)(1) was adopted.⁹⁵ The Bankruptcy Code allows a trustee to reject an unexpired lease or executory contract of a debtor.⁹⁶ The Bankruptcy Code provides that the tenant may retain the leasehold, including any renewal or extension that is "enforceable under nonbankruptcy law."⁹⁷ Thus,

RTC stated that it would not disaffirm the leases of low or moderate-income tenants. *Id.* Thus, the court's conclusion in this section is somewhat strained.

86. *Diamond*, 801 F. Supp. at 1161.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Diamond I*, 18 F.3d at 126.

91. *Id.*

92. *Id.* For a more indepth discussion of this issue, see *supra* notes 143 to 147 and the accompanying text.

93. *Id.*

94. *Id.*

95. See, e.g., *id.* at 122; *Unisys Finance Corp. v. RTC*, 979 F.2d 609 (7th Cir. 1992).

96. 11 U.S.C. § 365(a).

97. *Diamond I*, 18 F.3d at 122. This provision has been amended by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-465 (codified as amended in scattered

under the Bankruptcy Code, a trustee cannot disaffirm rent regulated leases, but the tenant can stay for all renewals and extensions.⁹⁸ According to the Second Circuit, the absence of this provision from FIRREA indicates Congress's intent to grant the RTC greater powers than those given to a trustee in bankruptcy.⁹⁹ The court concluded that because the rent regulations simply define and govern contracts, the RTC is empowered to disaffirm the rent regulated leases.¹⁰⁰

In addition, the Second Circuit interpreted FIRREA's provision allowing tenants to stay for the balance of the term of the lease. The tenants argued that the terms of the rent regulated leases are perpetual, because rent stabilized leases are automatically renewable and the terms of the rent controlled leases last as long as the lessees continue to pay.¹⁰¹ The court, however, responded that § 1821(e)(1) allows the tenant to stay only for the balance of the term and not for any renewal period.¹⁰² Thus, the Second Circuit held that the tenant may stay for the balance of the lease term for rent stabilized leases.¹⁰³ In addition, the Second Circuit held that the balance of the term of a rent controlled lease ends on the biennial date on which the landlord can apply for a new increase in rent.¹⁰⁴

D. *O'Melveny & Myers v. FDIC*

On October 3, 1994, the U.S. Supreme Court remanded and vacated the *Diamond I* decision of the Court of Appeals for the Second Circuit based on its recent decision in *O'Melveny & Myers v. FDIC*,¹⁰⁵ which discussed the creation of federal common law

sections of 11 U.S.C.). The changes, however, do not affect the analysis in this Note because the Bankruptcy Code in effect in 1989 was what Congress considered when drafting FIRREA.

98. See, e.g., *In re Ali Yasin*, 179 B.R. 43 (Bankr. S.D.N.Y. 1995); *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986).

99. *Diamond I*, 18 F.3d at 122. This Note discusses this point, at length, *infra* part IV.

100. *Id.* For a more in depth discussion, see *infra* part III.A.(i).

101. *Id.*

102. *Id.* at 123. For a more in depth discussion, see *infra* part IV.

103. Recall that the landlord and the tenant sign renewal leases every one or two years. See RENT STABILIZATION CODE § 26-511c(4).

104. *Id.* at 124.

105. 114 S. Ct. 2048 (1994). *O'Melveny* was one of the first Supreme Court decisions to discuss the application of federal common law in FIRREA. The Supreme Court issued its decision three months after the Second Circuit issued its decision in *Diamond I*.

under FIRREA.¹⁰⁶ The question in *O'Melveny* was whether the knowledge of corporate wrongdoing can be imputed to the FDIC when it sues as receiver of the corporation.¹⁰⁷ The precise issue before the Supreme Court was whether that question should be resolved by federal or state common law.¹⁰⁸ Justice Scalia, writing for a unanimous Court, held that state law governed the resolution of the question,¹⁰⁹ ruling that the FDIC is "place[d] in the shoes of the insolvent S & L" in order to try its claims under state law, except when some specific provision in FIRREA provides otherwise.¹¹⁰

The Court placed much significance on the fact that FIRREA explicitly created special federal rules of decision regarding claims and defenses in suits involving the FDIC as receiver.¹¹¹ The Court noted that when Congress enacts statutes in a specific area, it is inappropriate for courts to supplement the statutory law with federal common law where Congress has omitted the details.¹¹² Any details left out are normally resolved under state law.¹¹³ FIRREA,

106. *Solomon v. RTC*, 115 S. Ct. 43 (1994); *Pattullo v. RTC*, 115 S. Ct. 44 (1994).

107. *O'Melveny*, 114 S. Ct. at 2052.

108. *Id.* The doctrine of federal preemption derives from the Supremacy Clause of the Constitution which states that federal law "shall be the supreme Law of the Land . . . [the] laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. For much of the history of this country, constitutional jurisprudence held that this clause meant that there was a federal common law that was independent of the states' common law. In 1938, the Supreme Court ended this line of jurisprudence by holding, "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

109. *O'Melveny*, 114 S. Ct. at 2052. *But see*, *Gaff v. FDIC*, 919 F.2d 384 (6th Cir. 1990) (holding that federal common law governs issues concerning priority, ownership and adjustment of claims by stockholders against an insolvent bank after takeover by FDIC).

110. *O'Melveny*, 114 S. Ct. at 2054. Notwithstanding that decision, there are cases in which federal common law can be said to apply to a narrow range of issues. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *Kimbell Foods* set up a three part test to determine whether a federal court should apply a state law in the absence of a congressional enactment. Courts should consider, "[1] the need for a uniform body of federal law, [2] the likelihood that the disparate application of state laws would frustrate specific objectives of the federal program, and [3] the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Conille v. Secretary of Housing and Urban Development*, 840 F.2d 105, 112 n.11 (1st Cir. 1988).

111. *O'Melveny*, 114 S. Ct. at 2054.

112. This would seem to create a problem for the Second Circuit in *Diamond I*. As is discussed below, however, *O'Melveny* applies to what area of law should be applied in the absence of statutory federal law. In the *Diamond* case, however, the issue is how to construe a specific federal grant of power. *See infra*, Part III A.

113. *O'Melveny*, 114 S. Ct. at 2054. *See, e.g.*, *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 529 (1989) (holding Title VII of the

according to the Court, is a part of a broad scheme of banking regulations.¹¹⁴ If, however, there is a significant federal interest which is in conflict with a state interest, then the federal interest may prevail.¹¹⁵ The Court held, however, that the only identifiable interest at stake was uniformity of the law.¹¹⁶ Should the Court have found that interest as sufficient, the courts would be "awash in 'federal common-law' rules."¹¹⁷

E. *Resolution Trust Corporation v. Diamond* ("Diamond II")

Although much of the opinion in *Diamond I* discussed the definition of "contract or lease" contained within 12 U.S.C. § 1821(e)(1),¹¹⁸ the Supreme Court in *O'Melveny* held that details left out of a comprehensive federal scheme are presumed to be decided according to state law.¹¹⁹ *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*,¹²⁰ one of the cases cited in *O'Melveny* to support the presumption of state law application, distinguished a court's authority to create a new rule or provide a new remedy from a court's authority to construe a statute. On remand, the Second Circuit in *Diamond II*, however, interpreted this part of the *O'Melveny* decision narrowly, writing, "[o]ur reading of the cases cited by the Court following this [holding], demonstrates to us that the Court had in mind court-created remedies and causes of action, not definitions of terms used in a federal statute."¹²¹ Thus, the Second Circuit ruled that its holding in *Diamond I* was correct in using federal common law to interpret the

Civil Service Reform Act of 1978 does not imply a private cause of action for federal employees); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (which did not imply a cause of action for punitive damages for a violation of ERISA); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) (holding that Northwest Airlines has no federal common law right of contribution from the Union for violations of Title VII and the Equal Pay Act).

114. *O'Melveny*, 114 S. Ct. at 2054.

115. *Id.*

116. *Id.* at 2055.

117. *Id.*

118. *Diamond II*, 45 F.3d 665, 671 (2d Cir. 1995).

119. *O'Melveny*, 114 S. Ct. at 2054.

120. 451 U.S. 77, 97 (1981) (holding that Title VII of the 1964 Civil Rights Act and the Equal Pay Act did not contain an implied right of contribution).

121. *Diamond II*, 45 F.3d at 671. See, e.g., *Molzof v. United States*, 502 U.S. 301, 305 (1992) (holding that federal law governed the meaning of 'punitive damages' as used in 28 U.S.C. § 2674); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 431 (1986) (which held that federal law governed the meaning of 'debt' within the Bankruptcy Code). See also 1A JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.324 (2d ed. 1994).

words of a federal statute.¹²² As discussed above, *Diamond I* used federal preemption and statutory construction to determine that the RTC can disaffirm the rent regulated leases. The *Diamond II* court stated, "[o]ur decision in *Diamond I* does not (and did not purport to) write federal common law; we did not create a new remedy, cause of action, or rule of decision."¹²³

Thus, the Court of Appeals for the Second Circuit substantially reinstated its original opinion in *Diamond I*,¹²⁴ slightly modifying the balance of the term of a rent controlled lease.¹²⁵ The decision in *Diamond II* modified *Diamond I*'s holding that the term of a rent controlled lease ends on the date the landlord can apply for a new increase in rent.¹²⁶ While *Diamond I* sought to find the closest analogy to a lease term for rent controlled leases,¹²⁷ *Diamond II* altered the holding in *Diamond I* to bring it in line with new legislation,¹²⁸ which, recently enacted by the New York State Legislature, decontrols apartments for wealthy tenants.¹²⁹ Ostensibly, the court in *Diamond II* worried that under *Diamond I*'s holding, it was possible for the RTC to repudiate a rent controlled lease leaving the tenant with only a few days left before the expiration of the lease term.¹³⁰ Thus, the court in *Diamond II* held that the balance of the term of a rent controlled lease lasts until the first day of June in the year after the repudiation by the RTC.¹³¹

122. *Diamond II*, 45 F.3d at 671. The court further held, "[i]t is a 'settled principle of statutory construction that absent contrary indications, Congress intends to adopt the common law definition of statutory terms.'" *Id.* (quoting *United States v. Shabani*, 115 S. Ct. 382, 384 (1994) (citing, *Molzof*, 502 U.S. at 305-07 (1992))).

123. *Diamond II*, 45 F.3d at 671. For a more thorough discussion of the holding in *Diamond I*, see *supra* notes 90 to 103 and the accompanying text.

124. 18 F.3d 111 (1994).

125. *Diamond II*, 45 F.3d 665 (2d Cir. 1995).

126. *Diamond I*, 18 F.3d at 124.

127. 45 F.3d at 676.

128. *Id.* at 677.

129. It decontrols leases where the monthly rent exceeds \$2,000 and the annual family income of the tenant exceeds \$250,000 for the two preceding calendar years. 1993 Sess. Law News of N.Y., 216th Legislature, Ch. 253 (McKinney's 1993).

130. *Diamond II*, 45 F.3d at 676. The court seemed unconcerned that it is still possible for rent stabilized tenants to have their leases disaffirmed a few days before the end of the term.

131. *Id.* at 677.

III. The RTC's Repudiation Authority Under § 1821(e)(1)

Federal law preempts state or local law in three ways: express preemption, where Congress specifically preempts state law,¹³² implied preemption, where a federal scheme so "thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the states to supplement it' ",¹³³ and conflict preemption, where it is impossible to follow both the federal and the state laws.¹³⁴

Clearly, with respect to FIRREA and the New York City rent regulations, there are no grounds for implied preemption. While one could argue that Congress intended FIRREA to take up the whole field of banking law,¹³⁵ there is no evidence that Congress intended to preempt all of New York's housing regulations. Thus, the question of preemption of the rent regulations by § 1821(e)(1) confines itself to express and conflict preemption analysis.¹³⁶

The argument for express preemption centers on the principles of statutory construction. Under this analysis, the question is how broad to interpret the "any contract or lease" language of FIRREA. It is only necessary to determine if that language is sufficient to encompass rent regulated leases. If so, the RTC has the power to repudiate such leases. Alternatively, the argument for conflict preemption is that there is a direct confrontation between

132. See, e.g., *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557 - 58 (1990) (holding that federal law governs the meaning of "debts" in the Bankruptcy context); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986) (holding that federal law governs the meaning of the word "deposit" as applied to the Federal Deposit Insurance Act).

133. *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992) (quoting *Fidelity Fed. Sav. and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230)). See also, e.g., *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 300 (1988) (holding that state regulation of natural gas companies interfered with Congress' "intent to occupy [the] given field to the exclusion of state law.").

134. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that state law is preempted where it stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."); *FDIC v. Bank of Boulder*, 911 F.2d 1466 (10th Cir. 1990) (which held that state law prohibiting assignment of letters of credit was preempted as applied to an assignment from the FDIC as receiver of a failed bank to the FDIC in its corporate capacity).

135. For a more thorough discussion of the issue of whether FIRREA takes up the whole field of banking law, see *infra* notes 160 to 164 and the accompanying text.

136. The Second Circuit in *Diamond II* used similar reasoning when they ruled, "where there is a direct and irreconcilable conflict, the state law must yield We therefore hold that, to the extent that the anti-eviction provisions of New York's rent regulations interfere with the operation of § 1821(e), the state regulations and laws are preempted by FIRREA." *Diamond II*, 45 F.3d 665, 675 (2d Cir. 1995).

FIRREA, which allows the RTC to repudiate the leases,¹³⁷ and the rent regulations, which allow the tenant to maintain the leasehold for as long as the tenant pays rent.¹³⁸ Under conflict preemption analysis, this conflict must be resolved in favor of the federal law. Thus, when considering the question of whether § 1821(e)(1) permits the disaffirmance of rent regulated leases, there are two alternative analyses that one can pursue: express preemption or conflict preemption. Each of these are considered below.

A. Express Preemption

(1) Statutory Construction

The plain meaning of § 1821(e)(1) indicates Congressional intent to empower the RTC to disaffirm leases.¹³⁹ What is unclear is whether or not the "any contract or lease" language in § 1821(e)(1) includes rent regulated leases. Assuming that Congress intended the RTC to be able to disaffirm rent regulated leases, the question that arises is what language Congress could have used to be clearer. Both the district court decision in *Diamond* and the Appellee's brief for the Second Circuit in *Diamond I*, however, fail to suggest what sufficient other language Congress could have used.

One possible suggestion is to adopt the language of 12 U.S.C. § 1823(k)(1)(A)(i), which allows the RTC to merge or consolidate banking institutions upon a determination of severe financial conditions that threaten the stability of those institutions, "notwithstanding any provision of state law."¹⁴⁰ Congress uses this language because it wants the RTC to merge banking institutions, unfettered by state law. If Congress had used similar language in § 1821(e)(1), however, any state law that would have governed any aspect of the repudiation process would be preempted, not merely the rent regulations. Clearly, Congress's objective in § 1821(e)(1) was not to preempt all state laws involved. Rather, the language used in § 1821(e)(1) seems tailored to preempt laws similar to the rent regulations.¹⁴¹

137. 12 U.S.C. § 1821(e)(1).

138. RENT CONTROL CODE § 26-408a; RENT STABILIZATION CODE § 26-511c(4).

139. In interpreting statutes, courts must first analyze a statute's plain meaning. *BFP v. RTC*, 114 S. Ct. 1757, 1761 (1994); *Buttfield v. Stranahan*, 192 U.S. 470 (1904). See generally SUTHERLAND STAT. CONST. § 45.11 (5th ed. 1992).

140. Appellee's Brief at 26, *Diamond I* (No. 92-6244).

141. A contrary result would seem to allow states to preempt the RTC. If "any contract or lease" does not include rent regulated leases, then a state would only have to pass legislation that prevented the eviction of any tenant, commercial or residen-

The district court held, however, that notwithstanding the extent of the power of the RTC, the rent regulations create "statutory tenancies" which are "independent of any lease [the tenants] may have with their landlords, in this case the RTC."¹⁴² This ruling is contrary to New York law, which draws little distinction between statutory and non-statutory tenancies. New York courts have held that rent regulations are not entirely independent of the leases originally signed between the landlords and the tenants. For example, in *130 West 57th Corp. v. Hyman*,¹⁴³ the court held that "it would be carrying the protection afforded a tenant to an unfair degree to hold that the obligations of the tenancy incorporated in the lease do not govern the relationship of landlord and tenant."¹⁴⁴ Similarly, in *Hudson View Properties v. Weiss*,¹⁴⁵ the court held that the provisions of a lease that are not in conflict with the rent regulations "are projected into the statutory tenancy, and will continue in effect during the term of the statutory tenancy."¹⁴⁶ Thus, all of the terms of the original lease continue to function while the tenant is in possession. Only the rent and duration are controlled by statute.¹⁴⁷

(2) Deference to RTC

The rent regulations merely modify leases and do not replace them. Since rent regulated tenants do, in fact, have leases, the RTC has interpreted its power to repudiate "any contract or lease" under § 1821(e)(1) to include those leases.¹⁴⁸ The RTC interpretation is important because a federal agency's interpretation of legis-

tial, to prevent the RTC from repudiating tenants. Many other similar laws are possible. Clearly, this absurd result was not the intent of Congress.

142. *Diamond*, 801 F. Supp. at 1160.

143. 66 N.Y.S.2d 332 (N.Y. App. Term. 1946).

144. *Id.* at 334.

145. 442 N.Y.S.2d 367 (N.Y. App. Term. 1981).

146. *Id.* at 370, (quoting Rasch, *NEW YORK LANDLORD AND TENANT*, 2d ed., § 286) (other citation omitted).

147. One of the principal cases involving rent control is *Stern v. Equitable Trust Co.* of New York, 144 N.E. 578 (N.Y. 1924). In that case, the New York Court of Appeals held that the relationship of landlord and tenant in a rent regulated environment is lease based. The court remarked, "[t]he primary, but not the only, purpose of the Emergency Rent Laws was to prevent the wholesale eviction of tenants who were willing to pay a reasonable rent but who could not agree with their landlords as to the amount to be paid." *Stern*, 144 N.E. at 578. Thus, even 70 years ago, the Court of Appeals acknowledged that rent control regulates the rent and the landlord's ability to evict. It does not create tenancies independent of leases.

148. RTC Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulations (February 22, 1991).

lation, particularly the governing statute, must be given deference by courts.¹⁴⁹

FIRREA itself provides for significant deference to the RTC's discretion in § 1821(j)¹⁵⁰ and § 1821(d)(13)(D).¹⁵¹ In *Rosa v. RTC*, the U.S. Court of Appeals for the Third Circuit held that these sections allow the RTC to function as conservator or receiver "without judicial interference that would restrain or affect the exercise of its powers."¹⁵² Additionally, in *Morton v. Arlington Heights Federal Savings and Loan Ass'n.*, a district court held that "Congress intended to cut short any judicial inquiry into the propriety of the repudiation."¹⁵³

The Second Circuit in *1185 Avenue of the Americas Assocs. v. RTC* held that because more than one agency administers FIRREA, courts should not give deference to the RTC's interpretation.¹⁵⁴ Instead, the court applied whichever interpretation of the parties to the litigation was most reasonable.¹⁵⁵ To use a standard

149. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (upholding the Environmental Protection Agency's regulation interpreting the term "stationary source" in the Clean Air Act Amendments), the Supreme Court set up a two-part test to determine how much deference agencies will receive from courts for all agency interpretations of statutes. First, the court must determine if the intent of Congress is clear. *Id.* at 842. If the intent is clear, then the analysis need go no further. *Id.* Second, if the intent is not clear, then the issue becomes whether the agency's interpretation is "a permissible construction of the statute." *Id.* at 843. Thus, if the RTC's interpretation is reasonable, then courts must defer to that interpretation. See generally Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994).

150. 12 U.S.C. § 1821(j)(Supp. 1993) reads, in its relevant part, "[e]xcept as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver."

151. 12 U.S.C. § 1821(d)(13)(D) reads, in its relevant part, "no court shall have jurisdiction over (i) any claim or action . . . seeking determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver . . . or (ii) any claim relating to any act or omission of such institution or the Corporation as receiver."

152. 938 F.2d 383, 397 (3d Cir. 1991) (holding that provisions of an injunction prohibiting banks in receivership from attempting to terminate Employee Retirement Income Security Act pension plan was an invalid encroachment on the RTC's exercise of statutory power). See also *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir. 1992) (holding that FIRREA deprived a federal court of jurisdiction to enjoin the FDIC from foreclosing upon a certificate of deposit); *Bender v. Centrust Mortgage Corp.*, 833 F. Supp. 1525 (S.D. Fl. 1992) (holding that courts could not impose a constructive trust on assets of subsidiary so as to prevent its liquidation by the RTC).

153. 836 F. Supp. 477, 485 (N.D. Ill. 1993).

154. 22 F.3d 494, 497 (2d Cir. 1994) (holding that any repudiation by the RTC must be within a reasonable period of time following its appointment as receiver).

155. *Id.* at 497.

that applies the most reasonable interpretation would seem to be, in reality, equivalent to granting no deference at all.¹⁵⁶ Given that two agencies do interpret FIRREA, perhaps the RTC's interpretation does not deserve full deference.¹⁵⁷ Some deference, however, should be granted.¹⁵⁸

156. The cases which the Second Circuit cited to support this position do not actually use or suggest that standard. In *Lieberman v. Federal Trade Comm'n*, 771 F.2d 32 (2d Cir. 1985) (holding that the Clayton Act prohibited the Federal Trade Commission from confidentially informing state attorneys general of premerger information), the court held that when more than one agency administers a statute, "a reviewing court does not . . . owe *as much* deference," as it might otherwise. *Id.* at 37 (emphasis added). In fact, in dicta, the court stated that it was not suggesting that Congress could not delegate dual lawmaking authority. *Id.* at 37 n.11. Certainly, if two agencies which have the power to interpret a statute interpret the statute differently, the court is right in deciding to grant either agency no deference. *Id.* But, *Lieberman* does not support the proposition that absent such contrary interpretations, no deference should be granted to such agencies. It holds that such agencies deserve merely less deference than with only one agency. *Id.*

The other case cited by *1185 Avenue of the Americas Assocs.* is *Wachtel v. Office of Thrift Supervision*, 982 F.2d 581 (D.C. Cir. 1993) (holding that, based on a condition imposed on a holding company that the net worth of a savings bank be maintained, the Office of Thrift Supervision could not make a mandatory claim against the holding company without a showing of either reckless disregard of legal responsibilities or unjust enrichment). In that case, the Court of Appeals for the District of Columbia held that it would not defer to the Office of Thrift Supervision's interpretation because it ruled the statute unambiguous. *Id.* at 585. According to *Chevron*, a court must first find a statute ambiguous, before it reaches the issue of deference to an agency. See *supra* note 148, and the accompanying text. Because the statute was unambiguous, the analysis never needed to proceed beyond *Chevron's* first step. The second step - the question of whether the interpretation is a permissible one - was not a part of the holding. Thus, neither of the cases the Second Circuit cited in *1185 Avenue of the Americas Assocs.* support its conclusion that it should grant the RTC no deference.

157. *1185 Avenue of the Americas Assocs.* also held that whether a disaffirmed lease is burdensome, should be decided at the discretion of the RTC, when it is a conservator or receiver. 22 F.3d at 498. See, e.g., *Atlantic Mechanical, Inc. v. RTC*, 772 F. Supp. 288 (E.D. Va. 1991); *Morton*, 836 F. Supp. at 484. The appellees in the *Diamond* case, however, attempted to argue that the rent regulated leases were not "burdensome," as is required by § 1821(e)(1)(b). Appellee's Brief at 40, *Diamond* (No. 92-6244). The Appellees contention is that the "net present value return from the sale or other disposition of its assets" somehow includes the reduced value of the apartments due to their rent regulated nature. See 12 U.S.C. § 1441a(b)(3)(C)(i)(Supp. 1993). This argument is nonsensical. Even the Appellees admit that the units are undervalued. Appellee's Brief at 41. Furthermore, if the RTC can disaffirm the leases, then the property must be valued with that option in mind.

158. The FDIC has not, as of yet, issued a policy on this point. The question of where to draw the line is, however, beyond the scope of this Note.

B. Conflict Preemption

Unfortunately, other than the *Diamond* cases, few cases address FIRREA's conflict preemption of rent regulations.¹⁵⁹ There are several related cases, however, that are illuminating. *Patterson v. FDIC*, involves FIRREA's repudiation of property interests other than leases.¹⁶⁰ In that case, the Western Bank of El Paso, Texas foreclosed on several properties secured by deed of trust liens.¹⁶¹ After the Bank failed and the FDIC took over as receiver, the plaintiff sought "a declaratory judgment invalidating the deed of trust under Texas law because it encumbered her homestead."¹⁶² The FDIC claimed that the Texas law was preempted by 12 U.S.C. § 1823(e), which states that agreements are not valid when they "tend to diminish or defeat the interest of the [FDIC]"¹⁶³ Concerned with the meaning of "agreement" in § 1823(e), the Court of Appeals for the Fifth Circuit held that the reach of § 1823(e) was not so broad as to "override the Texas homestead laws, including its constitution."¹⁶⁴ *Patterson* thus provides a good example of a court's reluctance to preempt an entire area of state law through conflict preemption analysis.

There are a number of cases that involve the Department of Housing and Urban Development's ("HUD") preemption of local laws. In *Burroughs v. Hills*,¹⁶⁵ the district court held that local housing regulations applied to property owned by HUD, demonstrating a reluctance to allow HUD to preempt an entire area of state law. This case concerned properties that, when foreclosed by HUD, were in a state of severe disrepair. The issue was whether the local housing codes applied to any repairs conducted by

159. One notable exception is *RTC v. City of Boston*, 150 F.R.D. 449 (D. Mass. 1993). Similar to *Diamond*, the RTC sought a declaration that the rent control ordinance did not apply to the RTC's operations in Boston. This decision in this case, however, involved the right of the Commonwealth, tenants rights groups and a tenant to intervene. The issue of the legality of the RTC's position has yet to be resolved.

160. 918 F.2d 540 (5th Cir. 1990).

161. *Id.* at 541.

162. *Id.* at 542.

163. 12 U.S.C. § 1823(e) (Supp. 1993), which reads, in its relevant part, "[n]o agreement which tends to diminish or defeat the interest of the [FDIC] in any asset . . . shall be valid against the [FDIC]" This provision includes a lengthy exception which is beyond the scope of this Note.

164. The homestead laws are also protected, in part, by the Texas Constitution. See *Patterson*, 918 F.2d at 545.

165. 564 F. Supp. 1007 (N.D. Ill. 1983).

HUD.¹⁶⁶ HUD argued that the housing codes did not apply to repairs it conducted because HUD is a federal department and imposing the local housing codes on HUD would cost it significantly more money.¹⁶⁷ The court rejected this argument holding that preemption based solely on HUD's federal status would allow any federal entity to preempt any state law, whenever it wanted.¹⁶⁸ In rejecting the "it would cost more money" theory, the court ruled that this argument could also lead to significant abuse, as it could be used to avoid liability anytime that local law requires some expenditure of federal funds.¹⁶⁹

Despite *Burroughs*, there are many cases where HUD has preempted local housing laws. In each of these cases, however, federal law preempted specific laws rather than the states' entire housing laws. In *Conille v. Secretary of HUD*,¹⁷⁰ the Court of Appeals for the First Circuit, relying on *United States v. Kimbell Foods*,¹⁷¹ preempted a Massachusetts local law that required a higher level of maintenance than federal law for HUD-owned properties, stating, "certain [C]ongressional purposes underlying the [National Housing Act] would be frustrated if we [did not preempt]."¹⁷² Likewise, in *Ayers v. Philadelphia Housing Auth.*,¹⁷³ the Third Circuit held that HUD regulations preempted Pennsylvania eviction procedures when it found that application of the state law would frustrate many of the objectives of the housing program.¹⁷⁴

The Court of Appeals for the First Circuit has rendered two decisions involving HUD's preemption of Boston's rent control laws. In *Kargman v. Sullivan*,¹⁷⁵ the landlords of federally-subsidized low and middle-income housing projects were subject to both federal and local laws regulating the permissible rents. The landlords of these HUD-subsidized properties brought suit asking the court to hold that federal law preempted state law.¹⁷⁶ At the time of the suit, HUD had not taken a position on the applicability of the local

166. *Id.* at 1018. The court rejected an express preemption argument, ruling that HUD's own guidelines supported the defendants' position on the preemption issue. *Id.* at 1019.

167. *Id.* at 1019.

168. *Id.*

169. *Id.*

170. 840 F.2d 105 (1st Cir. 1988).

171. 440 U.S. 715 (1979). *See also supra* note 110.

172. *Conille*, 840 F.2d at 112.

173. 908 F.2d 1184 (3d Cir. 1990).

174. *Id.* at 1192; *cf. Rowe v. Pierce*, 622 F. Supp. 1030 (D.D.C. 1985).

175. 552 F.2d 2 (1st Cir. 1977).

176. *Id.* at 6.

rent controls on HUD-subsidized, privately-owned properties.¹⁷⁷ The First Circuit held that the mere potential for conflict was not enough to justify the conclusion that federal power preempts an otherwise valid exercise of state sovereignty.¹⁷⁸

Three years later, however, the Secretary of HUD promulgated a regulation that specifically preempted all local rent controls.¹⁷⁹ Distinguishing *Kargman*,¹⁸⁰ the Court of Appeals for the First Circuit in *City of Boston v. Harris*,¹⁸¹ held that

[t]hat case, unlike this one, presented no actual conflict between the operation of HUD's subsidized insured housing programs and Boston's rent control for the regulations [of HUD] . . . were not then in effect [T]hat case turned upon . . . evidence presented at a time when the Secretary's own policies were unclear and, indeed, had vacillated.¹⁸²

Thus, the First Circuit allowed HUD to issue a regulation that preempted all state and local rent control laws based on the conflict between HUD's regulation and the state's laws.¹⁸³ The court wrote, "the fact that Congress itself did not foreclose local rent control does not indicate it intended to preclude [a federal agency] from so doing."¹⁸⁴ The Southern and Eastern Districts of New York, adopting the reasoning in *Harris*, have also held that HUD's decision to preempt local rent control laws is discretionary, and not subject to judicial review.¹⁸⁵

177. *Id.*

178. *Id.* at 13.

179. 40 Fed. Reg. 8189 (1975).

180. *See supra* notes 175 to 179 and the accompanying text.

181. 619 F.2d 87 (1st Cir. 1980).

182. *Id.* at 94.

183. The court cited the authority vested in HUD by 42 U.S.C. § 3535(d), which, "gives the Secretary broad powers under the NHA to 'make such rules and regulations as may be necessary to carry out [her] functions, powers, and duties.'" *Id.* *See also* *New York v. Federal Communications Comm'n*, 486 U.S. 57, 63-64 (1988) (holding that a Federal agency may preempt state or local laws that are otherwise not inconsistent with federal law).

184. *Harris*, 619 F.2d at 95.

185. *Pumphrey v. Pierce*, June 29, 1984 WL 588, *3 (S.D.N.Y. June 29, 1984); *Gramercy Spire Tenants' Ass'n v. Harris*, 490 F. Supp. 1219, 1225 (S.D.N.Y. 1980); *Argo v. Hills*, 425 F. Supp. 151 (E.D.N.Y. 1977). There are several other related cases, involving other federal entities. *See* *Bronstein v. Philadelphia Fair Housing Comm'n*, 488 F. Supp. 1357 (E.D. Pa. 1980) (holding that a HUD regulation preempted the Federal Housing Commission's attempt to stop HUD approved rent increase); *Columbia Plaza Ltd. Partnership v. Cowles*, 403 F. Supp. 1337 (D.D.C. 1975) (holding that the National Housing Act did not preempt the District of Columbia's rent control statute).

As indicated by both *Patterson* and *Burroughs*, when considering conflict preemption, courts are much more likely to hold that federal law preempts specific local laws than a whole area of law. In *Patterson*, the U.S. Court of Appeals for the Fifth Circuit held that § 1823(e) did not preempt Texas laws protecting homesteads from forced sales. The Texas Constitution provides, "[t]he homestead . . . shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon."¹⁸⁶ Thus, Federal law did not preempt Texas law where the state law gave *Patterson* a homestead right that "exists independent of any agreement between the parties."¹⁸⁷

The rent regulations, unlike the state laws in *Patterson*, are clearly not a whole area of law.¹⁸⁸ New York State has several significant statutes designed to alleviate the problems of substandard housing, in addition to the rent regulations.¹⁸⁹ They allow: the tenant to claim a warrantee of habitability,¹⁹⁰ rent to be withheld by the welfare authorities,¹⁹¹ rent to be abated during continuing "rent impairing" violations,¹⁹² and the offending building to be vacated.¹⁹³ The rent regulations are a small part of a larger scheme,¹⁹⁴ which New York designed to alleviate the shortage of well-maintained housing. Conversely, the Texas law in *Patterson* is a part of the State Constitution, which protects a homestead from practically any forced sale, save those that are related to tax payments, or purchasing or improving the homestead. Similarly, *Bur-*

186. TEX. CONST. art. XVI, § 50.

187. *Patterson*, 918 F.2d at 543 (quoting *In re Howard*, 65 B.R. 498, 503 (W.D. Tex. 1986) (citing *FDIC Corp. v. Blue Rock Shopping Center*, 766 F.2d 744, 753 (3d Cir. 1985))). See also *American Federation of State, County and Mun. Employees v. FDIC*, 826 F. Supp. 1448 (D.D.C. 1992).

188. See generally *id.*; *City of Boston v. Harris*, 619 F.2d 87 (1st Cir. 1980); Joseph Rasch, *NEW YORK LANDLORD AND TENANT* (3d ed. 1988).

189. Other significant New York State Laws governing rents, include laws concerning: when rent due on life leases is recoverable, N.Y. REAL PROP. LAW § 221 (McKinney 1989); when rent is apportionable, *id.* § 222; effect of acceptance of rent from a holdover tenant, *id.* § 232-c; tenant's right to offset rent payments, *id.* § 235-a; and the duty of the landlord to provide written receipt of rent payments, *id.* § 235-e.

190. N.Y. Real Prop. Law § 235-b.

191. N.Y. SOC. SERV. LAW § 143-b (1992).

192. N.Y. MULT. DWELL. LAW § 302-a (1974).

193. *Id.* at § 309. Several other important statutes allow: rent to be withheld by a petition of one-third of the tenants, N.Y. REAL PROP. ACT art. 7A, § 770, and, a city to place a building into receivership, allowing the city to make necessary repairs and obtain a lien on all rents to insure reimbursement. N.Y. MULT. DWELL. LAW § 309.

194. See generally N.Y. Real Prop. Law art. 7 (McKinney 1989).

roughs held that HUD, when rebuilding a dilapidated HUD-owned property, could not preempt the entirety of local housing building codes.¹⁹⁵ The New York rent regulations cannot be characterized as the same broad schemes that courts protected from preemption in *Patterson* and *Burroughs*. Thus, under the conflict preemption analysis, § 1821(e)(1) gives the RTC the power to repudiate rent regulated leases.

IV. The Balance of the Term in 12 U.S.C. § 1821(e)(5)(A)

When the RTC, acting as conservator or receiver, disaffirms a lease, "the lessee may either (i) treat the lease as terminated by such repudiation; or (ii) remain in possession of the leasehold interest for *the balance of the term*."¹⁹⁶ At the surface, the phrase "balance of the term" is rather simple to define. BLACK'S LAW DICTIONARY defines term, in connection with a lease as, "the period which is granted for the lessee to occupy the premises."¹⁹⁷ Questions have consistently arisen as to whether the "balance of the term" includes renewals.¹⁹⁸ Unfortunately, the legislative history of § 1821(e) is sparse, merely "confirm[ing] the historic right of a conservator or receiver to disaffirm or repudiate contracts."¹⁹⁹ The question of renewals is left unanswered.

Courts have, however, recognized that Congress adopted this section from § 365 of the Bankruptcy Code (the "Code").²⁰⁰ Section 365(h)(1) stated that "the lessee . . . may remain in possession of the leasehold . . . under any lease . . . the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee . . . under applicable nonbankruptcy law."²⁰¹ Thus, the Bankruptcy Code al-

195. 564 F. Supp. 1007

196. 12 U.S.C. § 1821(e)(5)(A) (emphasis added).

197. BLACK'S LAW DICTIONARY 1471 (6th ed. 1990).

198. The implications of that question for leases governed by the rent regulations are obvious. If renewals are included in the definition of the "balance of the term," then it is possible to conclude that the renewals, under the rent regulations, are perpetual.

199. H.R. REP. NO. 54(I), 101st Cong., 1st Sess., at 331 (1989), *reprinted in*, 1989 U.S.C.C.A.N. 86, 127.

200. *See, e.g.*, *Franklin Fin. v. RTC*, 53 F.3d 268 (9th Cir. 1995); *Diamond I*, 18 F.3d 111; *Unisys Fin. Corp. v. RTC*, 979 F.2d 609 (7th Cir. 1992).

201. 11 U.S.C. § 365(h)(1). Recall that Congress amended the Code in 1994. The Bankruptcy Reform Act of 1994, Pub. L. 103-465 (codified as amended in scattered sections of 12 U.S.C.). Section 365(h) now states that if the debtor is a lessor and chooses to terminate the lease,

then the lessee under such lease may treat such lease as terminated by the rejection; or . . . the lessee may retain its rights under such lease (including

lows tenants of debtor landlords to stay for the remainder of the term plus renewals.²⁰²

Congress, in enacting § 365(h) of the Code, brought "clarity to an area of bankruptcy practice sorely in need of clarification."²⁰³ The legislative history indicates that Congress wanted to end the struggle in the Courts over whether, under the Bankruptcy Code, renewal terms are part of the lessee's estate.²⁰⁴ Congress intended to protect the balance of the term and renewals and to make sure the lessee was not deprived of his estate. Regarding the inclusion of both of the balance of the term and the renewals, the House report states, "[t]hus, the tenant will not be deprived of his estate for the term for which [the tenant] bargained."²⁰⁵ Therefore, because the Code included both the balance of the term and renewals, it would seem that Congress did not believe that the balance of the term included renewal periods.

When interpreting the choice of language of one statute, there is precedent for looking to another statute.²⁰⁶ FIRREA, in

rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law. 11 U.S.C. § 365(h)(1)(A)(i)-(ii).

202. Case law indicates that when examining the legislative history of the Bankruptcy Code, it is appropriate to analyze its predecessor, the Bankruptcy Act ("the Act"). *Dewsnup v. Timm* (In re Dewsnup), 502 U.S. 410, 418-20 (1992). The Act, as amended by the Chandler Act, Ch. 575, 52 Stat. 840 (1938), stated that any repudiation of a lease by a trustee in bankruptcy shall not, "deprive the lessee of his estate." 11 U.S.C. § 110b (1964) *repealed by*, Bankruptcy Code (1978). Since the passage of the Chandler Act and up to the passage of the Code, courts struggled with the meaning of the lessee's "estate." Professor James MacLachlan, one of the chief architects of the Chandler Act, wrote, when discussing that section of the Act, "I had in mind the general principals of property and of contract . . . that a lease is a conveyance and not just a contract." John J. Crendon and Robert M. Zinman, *Landlord's Bankruptcy: Laissez les Lessees*, 26 Bus. Law. 1391 app. at 1439 (1971). Professor MacLachlan went on to point out that the estate must be protected. *Id.* This is particularly so, when considering the implications of the Fifth and Fourteenth amendments to the Constitution.

203. In re Penn Central Transp. Co., 458 F. Supp. 1346, 1356 n.10 (E.D. Pa. 1978). For more information on the Bankruptcy Act's treatment of renewal terms, see generally Crendon and Zinman, *supra* note 202. See also *Coy v. Title Guar. and Trust Co.*, 198 F. 275 (D. Or. 1912).

204. H.R. REP. NO. 595, 95th Cong., 1st Sess. 349 (1978).

205. *Id.*

206. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. RTC*, 114 S. Ct. 1757, 1761 (1994) (*quoting* *Chicago v. Environmental Defense*

§ 1821(e)(5)(A), speaks only of the "balance of the term." The adoption of § 1821(e)(5)(A) from the Bankruptcy Code,²⁰⁷ and the Code's inclusion of both the balance of the term and renewals indicate Congressional intent to have a disaffirmed tenant remain only for the balance of the term, and not renewals.²⁰⁸

Assuming that the balance of the term does not include a renewal period, there remains the question of what is the balance of the term of a rent regulated lease. For a rent stabilized lease, the answer is fairly obvious. Since § 26-511c(4) of the rent stabilization code provides that a landlord shall provide a one or two year renewal lease, the balance of the term is what remains of that lease.

The question, however, is considerably more difficult for a rent controlled lease because the rent control code does not contemplate a lease term. In any rent controlled lease, there was a lease, with a term, prior to the passage of rent control. Rent control forces the landlord to extend that term for as long as the tenant continues to pay rent.²⁰⁹ In *Diamond I*, the Court of Appeals for the Second Circuit held that the term of a rent controlled lease is, "two years, commencing on the January 1 of the last biennial review set by the statute prior to notice of repudiation."²¹⁰ The court

Fund, 114 S. Ct. 1588, 1593 (1994)). This logic also applies when Congress creates one statute by adopting it from another. In *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131 (1943), the Supreme Court defined the scope of the Fair Labor Standards Act (FLSA) by referring to the Federal Employers' Liability Act (FELA), writing, "[the statutes] are not strictly analogous, but they are similar . . . [w]e see no persuasive reason why the scope of employed or engaged 'in commerce' [in the FELA] . . . should not be applied to the similar language in the FLSA."

207. See *supra* note 200 and the accompanying text.

208. If the RTC disaffirms a lease, allowing the lessee to stay only for the balance of the term and not for any renewals, it is possible that this would create a Fifth Amendment 'takings' problem. As the Supreme Court has held, "[i]t has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States." *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303 (1976). Thus, one issue that a court may face is whether a renewal term is a part of an "unexpired leasehold interest." The Bankruptcy Act's repudiation provision spoke of protecting that interest. Courts, in interpreting the Bankruptcy Act, have come down on both sides of this issue. Unfortunately, the Bankruptcy Code does not use that phrase. Therefore, the case law on this issue is limited to pre-Code cases, and is not likely to be developed significantly in the near future. Compare, *In the Matter of New York Investors Mut. Group, Inc.*, 153 F. Supp. 772 (S.D.N.Y. 1957) (which did not allow a trustee in bankruptcy to reject a renewal), with, *Coy v. Title Guar. & Trust Co.*, 198 F. 275 (D. Or. 1912) (which allowed a trustee in bankruptcy to reject a renewal). This is, however, an extremely difficult issue that remains to be resolved. See also *Creedon & Zinman*, *supra* note 202.

209. RENT CONTROL CODE § 26-408a.

210. *Diamond*, 18 F.3d at 124.

focused on the provision of the rent control code where the maximum rents are adjusted by the city rent agency every two years.²¹¹

The rent control code permits landlords to apply for rent increases periodically; this periodic application is not equivalent to a lease term. Rent control extends the term of the original lease seemingly indefinitely or, at the very least, for the length of the "housing emergency" that spurred the creation of rent control. This is the conclusion the Second Circuit was apparently trying to avoid. The court was concerned that if the balance of the term was the remainder of the "emergency," the rent control code would possibly face a constitutional challenge under the Fourteenth Amendment as a "taking."²¹² In *Block v. Hirsh*,²¹³ the appellee, a landlord, claimed that the District of Columbia's rent control statute was unconstitutional as an attempt to take property—his right to regain possession after the expiration of the lease—without compensation.²¹⁴ The Supreme Court held that rent control was not an unconstitutional taking requiring compensation, provided that the rent restrictions were temporary, stating, "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."²¹⁵

The problem is that rent control in New York may no longer be considered temporary. If the Court of Appeals for the Second Circuit had held that the balance of the term of a rent controlled lease lasts for the length of the "emergency," it would have come to the absurd conclusion that rent control has extended lease terms to

211. RENT CONTROL CODE § 26-405a(4).

212. *Diamond*, 18 F.3d at 123. The Fifth Amendment to the Constitution states, in its relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The takings analysis of the Fifth Amendment, applies to the states through the Fourteenth Amendment of the Constitution. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). See also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.6, at 386 n.34 (4th ed. 1991).

213. 256 U.S. 135 (1921).

214. *Id.* at 153.

215. *Id.* at 157. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). For more information on rent control as a taking, see R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 SW. U. L. REV. 1019 (1992); Michael D. Bergman, *Property Law: Recent Developments in Rent Control and Related Laws Regulating the Landlord-Tenant Relationship*, 1989 ANN. SURV. AM. L. 691 (1991); Symposium, *supra* note 28; Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 HARV. L. REV. 1067 (1987). A recent decision by the New York Court of Appeals may bring new litigation on the issue of rent control as a regulatory taking. See *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994); R.S. Radford, *Why Rent Control Is a Regulatory Taking*, 6 FORDHAM ENVTL. L.J. 755 (1995).

more than forty years in length.²¹⁶ The Second Circuit, however, in *Diamond I*, eager to avoid this conclusion, held that the time between possible rent adjustments provided "the strongest analogy to a lease expiration."²¹⁷ When the Supreme Court vacated and remanded the decision,²¹⁸ the Second Circuit took the opportunity to reconsider its earlier opinion, and modified its ruling on the balance of the term of a rent controlled lease.²¹⁹ While *Diamond II* does make clear that the Second Circuit continued to search for the closest analogy,²²⁰ the decision does not state that the court sought to avoid the "takings" problem by finding a fixed rent controlled lease term. Instead, it modified its earlier decision to avoid allowing the RTC to repudiate a tenancy a few days before the end of the term.²²¹ Citing New York State's recent law that decontrols tenancies for wealthy families,²²² *Diamond II* held that the term lasts until, "the first day of June in the year next succeeding the filing of the certification of the owner."²²³

This is still an analogy to an actual lease term. It is not a lease term, *per se*. There will continue to be problems with the lease term of a rent controlled lease, unless the rent control code is amended to include a lease term. If the state or city legislatures wish to protect tenant rights, they must define a lease term. Conversely, the RTC, as a Federal agency, does not concern itself with the rights of rent regulated tenants who are not of low or moderate-income.²²⁴ One possible solution is to amend the rent control code to provide for renewal leases, similar to rent stabilization.²²⁵ Thus, the rent control code might state, "Beginning in 1995, the terms of all rent controlled leases will be five years. At the expiration of such term, owners shall grant a renewal lease of five years. Such renewal leases shall be subject to all other provisions of the rent control code." If the state or city legislatures do not amend

216. RENT CONTROL CODE § 26-403(e)(1).

217. *Diamond II*, 45 F.3d at 676.

218. The Supreme Court vacated and remanded to allow the Second Circuit to issue a new opinion, taking into account *O'Melveny*. See *supra* Part II D.

219. *Diamond II*, 45 F.3d at 668.

220. See *Diamond II*, 45 F.3d at 676, 677.

221. *Id.* at 676.

222. The law decontrols leases where the family income of the tenant exceeds \$250,000 annually and the monthly rent is above \$2,000. 1993 Sess. Law News of N.Y., 216th Legislature, Ch. 253 (McKinney 1993).

223. *Diamond II*, 45 F.3d at 677.

224. The RTC's goals are set forth in 12 U.S.C. § 1421(b)(3)(C)(i) - (v). None of the goals listed indicate that the RTC should be concerned with the *Diamond* tenants' rights. See *supra* note 61 and the accompanying text.

225. RENT STABILIZATION CODE § 26-511c(4).

the rent control code similar to this hypothetical provision, rent controlled tenants face uncertain court proceedings, which will determine the length of a rent controlled lease. In *Diamond II*, the Second Circuit held that the term is two years. If a court found, for example, that the term of a rent controlled lease was infinite, then it might face a Fourteenth Amendment takings challenge. The New York State and/or City legislatures have an opportunity to bring clarity to this issue and protect the rent controlled tenants by amending the rent control code.²²⁶

V. Conclusion

Clearly, rent control leases are burdensome to the RTC. FIRREA includes the historic right of conservators and receivers to disaffirm leases and contracts. When resolving the ability of the RTC to disaffirm leases regulated by local law, there are two possible analyses: express preemption and conflict preemption.

The express preemption argument centers on the principles of statutory construction. When attempting to construe the language of a statute, it is often helpful to consider what other language Congress may have used. Section 1821(e)(1) specifically uses "any contract or lease." This language is tailored to preempt regulations similar to the rent regulations. Even if the language is not clear, the RTC, as a Federal agency deserves some deference in its interpretation of its governing statute.

Under conflict preemption, courts have been unwilling, at times, to preempt a whole field of local law. Courts have allowed, however, federal entities to preempt specific local laws. In *Diamond*, there is a clear conflict between the provisions of FIRREA and a specific set of local laws: the rent regulations. The rent regulations are a small part of a larger system of housing laws in New York. Thus, FIRREA preempts the rent regulations. The leases can be repudiated by the RTC under this analysis as well. Therefore, under either the conflict preemption analysis, or the statutory construction analysis, the RTC has the power to disaffirm the rent regulated leases.

Once disaffirmed, FIRREA provides that the lessee may stay for the balance of the term. Based on a comparison to Bankruptcy Law, on which § 1821(e) was based, Congress intended that the lessee could stay only for the balance of the term, and not renew-

226. This conclusion, however, does not consider the propriety of the rent regulations themselves. See *supra* notes 52-55 and the accompanying text.

als. The balance of the term of a rent stabilized lease is the remainder of the lease term, which normally would be renewed every one or two years. Rent control, however, does not contemplate a lease term. It extends the term of the lease indefinitely. Therefore, rent control should be amended to delineate specifically the term of a rent controlled lease. A possible solution is to amend rent control such that it provides an automatic renewal every one or two years, similar to rent stabilization. If rent control is not amended, courts, like the *Diamond II* court, will be forced to use the closest analogy.²²⁷

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227. 45 F.3d at 676-77.

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